Summary: Defendant Pokorny Chiropractic Clinic filed a motion to dismiss, claiming it is not subject to suit under North Dakota law. The Court granted the motion, finding that no partnership involving the Clinic has been established and it is not a legal entity subject to suit.

Case Name: Cochell v. Pokorny Chirpractic Clinic, et al.
Case Number: 1-09-cv-31
Docket Number: 46
Date Filed: 3/4/10
Nature of Suit: 362

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Melissa Cochell, Plaintiff, vs. Pokorny Chiropractic Clinic, Richard Pokorny, DC, Sheldon Gordon, DC, and Jeffrey D. Pokorny, DC, Defendants.	)	**ORDER GRANTING DEFENDANT POKORNY CHIROPRACTIC CLINIC'S MOTION TO DISMISS** Case No. 1:09-cv-031

Before the Court is Defendant Pokorny Chiropractic Clinic's (Clinic) motion to dismiss filed on July 9, 2009. See Docket No. 10. The Clinic appeared specially and filed a Rule 12(b)(2) motion to dismiss arguing it is neither a partnership nor any other type of legal entity subject to suit under North Dakota law. The Plaintiff filed a response in opposition to the motion on August 10, 2009. See Docket No. 19. On August 17, 2009, the Clinic filed a reply brief. See Docket No. 24. On February 8, 2010, the Clinic filed a "supplemental brief in support of motion to dismiss." See Docket No. 37. The Plaintiff filed a brief in response on February 23, 2010. See Docket No. 42. For the reasons set forth below, the Court grants the Clinic's motion.

I. BACKGROUND

This action was commenced on June 15, 2009. Jurisdiction is based upon diversity of citizenship. All of the Defendants are North Dakota residents. The Clinic is located in Dickinson, North Dakota, and has been named as a defendant. The plaintiff, Melissa Cochell (Cochell), is a resident of Montana. On August 14, 2009, the defendant, David Pokorny (Dr. David),was dismissed from the lawsuit. See Docket No. 20.

Defendants Richard Pokorny (Dr. Richard), Sheldon Gordon (Dr. Gordon), and Jeffrey Pokorny (Dr. Jeff) are all chiropractors who work at, or formerly worked at, the Clinic. Dr. David also worked at the Clinic but retired in 2006. Dr. David owns the building in which the Clinic is located. Dr. Gordon left the Clinic in March 2008.

In 1986, Dr. Richard joined the Clinic which Dr. David had operated for several years. The agreement recited the intention of both doctors that they conduct the clinic as "separate but cooperative sole proprietorships." See Docket No. 42-1. Clinic expenses were to be shared on a 50/50 basis. Profits and losses were not shared. Dr. David was tasked with managing the Clinic and he was compensated for his management services. All of the equipment, furnishings, and patient files in the Clinic are owned by Dr. David and Dr. Richard. As of January 1, 2006, Dr. David owns a 48% interest and Dr. Richard owns a 52% interest in the clinic.

Dr. Jeff began working at the Clinic in 2002. Currently, Clinic expenses are split 50/50 between Dr. Jeff and Dr. Richard. Dr. Richard and Dr. Jeff maintain separate practices with no sharing of profits. They maintain separate malpractice insurance policies, pay for their own seminars, and file separate tax returns. The Clinic itself does not file tax returns. The office arrangement between Dr. Jeff and Dr. Richard has been in place since 2006 when Dr. David retired but has never been reduced to writing. Dr. Richard acts as the office bookkeeper. The Clinic itself

does not maintain any bank accounts. All revenue is deposited into Dr. Richard's bank account and Dr. Richard issues monthly paychecks to Dr. Jeff. Patients typically make their checks payable to the Pokorny Chiropractic Clinic. Dr. Richard also provides Dr. Jeff with a 1099 tax form each year.

Dr. Sheldon Gordon began working at the Clinic in March of 2007. He worked under a proctorship with Dr. Jeff in 2007 and was paid directly by Dr. Jeff. Dr. Richard did not contribute to Dr. Gordon's salary. Dr. Jeff issued Dr. Gordon a 1099 tax form for the work he performed. Dr. Gordon was working on passing the national chiropractic board exams when he began his proctorship under Dr. Jeff in 2007. Dr. Gordon obtained his North Dakota chiropractic license in November of 2007. Starting in January of 2008, Dr. Gordon was paid by check written by Dr. Richard. He then began receiving 50% of the income he brought in with the other 50% going directly to Dr. Jeff. Prior to that time Dr. Gordon had been paid a flat salary of $1,500 per month. Dr. Gordon paid for his own malpractice insurance while he was at the Clinic.

Cochell was treated by Dr. Sheldon Gordon and Dr. Jeff Pokorny at the Clinic in June of 2007. Cochell alleges she received substandard treatment resulting in bodily injury. Cochell seeks to hold the Clinic responsible for her injuries under the doctrine of respondeat superior.

II. STANDARD OF REVIEW

The motion before the court is a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. "To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction." Epps v. Stewart Info. Servs. Corp., 327 F.3d 642, 647 (8th Cir. 2003) (citing Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 373 (8th Cir. 1990); Watlow Elec. Mfg. v. Patch Rubber Co., 838 F.2d 999, 1000 (8th Cir. 1988)). "The plaintiff's prima facie showing must be tested, not by the pleadings alone, but by the affidavits and

exhibits presented with the motions and in opposition thereto." Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072 (8th Cir. 2004). The party seeking to establish the court's in personam jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction. Epps, 327 F.3d at 647 (citations omitted).

III. LEGAL DISCUSSION

The issue before the Court is the legal status of the Pokorny Chiropractic Clinic. In her complaint, Cochell alleged the Clinic was a general partnership between Dr. David Pokorny, Dr. Richard Pokorny, and Dr. Jeff Pokorny. In lieu of an answer, the Clinic appeared specially and filed a motion to dismiss. The clinic contends that it is not a partnership or any other legally-recognized entity subject to suit or service of process. Subsequent to Dr. Richard and Dr. Jeff filing their respective answers and the Clinic filing its motion to dismiss, Cochell voluntarily dismissed Dr. David Pokorny from the lawsuit. See Docket No. 15. Cochell argued in her response to the Clinic's motion to dismiss that Dr. Richard and Dr. Jeff were partners. After a scheduling conference was held, the parties were advised that the Court would defer ruling on the motion to dismiss in order to give the parties time to conduct discovery and submit supplemental briefs. In its supplemental brief the Clinic argued that Dr. Richard and Dr. Jeff are not partners. Cochell did not address the issue in her supplemental response. Rather, Cochell stated that the issue of whether Dr. Richard and Dr. Jeff were partners was not before the Court – despite the fact that Cochell had made such an argument in her initial response to the motion to dismiss and the issue had been thoroughly briefed by the Clinic in its supplemental brief. Instead, Cochell argues that Dr. Richard and Dr. David are partners in the Clinic. The Clinic did not address this issue in its supplemental response. The Court will address both issues in determining the legal status of the Clinic.

North Dakota law defines a partnership as "an association of two or more persons to carry on as coowners a business for profit." N.D.C.C. § 45-13-01(19). A partnership may be formed whether or not the persons intended to form a partnership. N.D.C.C. § 45-14-02(1). Whether a partnership exists is governed by the facts and circumstance unique to each case and not by any one factor. Tarnavsky v. Tarnavsky, 147 F.3d 674, 677 (8th Cir. 1998). A partnership has three crucial elements, which are: (1) an intention to be partners; (2) co-ownership of the business; and (3) a profit motive. Sandvick v. Lacrosse, 747 N.W.2d 519, 521 (N.D. 2008). All three elements must be present in order for a partnership to exist and not every business association forms a partnership. Ziegler v. Dahl, 691 N.W.2d 271, 276 (N.D. 2005). The existence of a partnership is a mixed question of law and fact with the ultimate determination being a question of law for the court to resolve. Sandvick, 747 N.W.2d at 521.

It is well-established that intent must be discerned from the evidence and can be derived from the actions of the parties. Tarnavsky, 147 F.3d at 677 (8th Cir. 1998); Gangl v. Gangl, 281 N.W.2d 574, 580 (N.D. 1979). The subjective intent of the parties is persuasive but not conclusive. This is because two individuals may inadvertently create a partnership despite the express desire not to do so. Ziegler, 691 N.W.2d at 276. The parties must intend to be part of a business relationship that includes co-ownership and a profit motive. Id. Intent may be found despite the lack of a writing or oral expression evidencing an intent to form a partnership. Gangl, 281 N.W.2d at 580.

The Tarnavsky case involved a family ranching operation. Intent to be partners was found from the filing of partnership income tax returns, a 50/50 profit and loss allocation, a joint bank account entitled "Tarnavsky Brothers," joint cattle and equipment purchases, and the joint borrowing of money. Tarnavsky, 147 F.3d at 677. Ziegler involved five individuals engaged in a fish-guiding service. Two of the individuals involved argued that a partnership existed while the other three

individuals maintained they were independent contractors working in association. Ziegler, 691 N.W.2d at 276. Intent was found lacking because partnership tax returns were never filed, each party provided his own equipment, and all major decisions were made without any input from two of the individuals.

Co-ownership is defined by the sharing of profits and losses and the power of control over the management of the business. Ziegler, 691 N.W.2d at 276, 277. Control is an indispensable component of any co-ownership analysis. Id. The existence of shared control, or the right to share control combined with profit sharing, is powerful evidence of the existence of a partnership. Gangl, 281 N.W.2d at 580; Tarnavsky, 147 F.3d at 678. In Tarnavsky, both brothers were found to be responsible for certain critical aspects of the ranching business and this division of labor was found to be strong evidence that they both had control over the management of the business. Tarnavsky, 147 F.3d at 678. The third element of a partnership is a profit motive. There is no dispute that the Clinic was operated with a profit motive.

A. DR. RICHARD POKORNY AND DR. JEFF POKORNY

The record does not reveal an intent to form a partnership between Dr. Richard Pokorny and Dr. Jeff Pokorny. Both Dr. Richard and Dr. Jeff testified at their depositions that they were not partners. They never filed partnership tax returns. They did not share profits but rather had an "eat what you kill" arrangement as to income. Expenses, which included rent, were split 50/50 as would be typical in an office sharing arrangement among two professionals. Each chiropractor was responsible for his own licensing fees, malpractice insurance coverage, and seminar fees. No joint bank account was ever maintained. The Clinic itself has never been registered as a legal entity in the State of North Dakota nor filed tax returns. All of the equipment in the Clinic was owned jointly

by Dr. David Pokorny and Dr. Richard Pokorny. Dr. Jeff had no ownership interest in the equipment.

As to the issue of co-ownership the record is somewhat vague. Dr. Richard exercised more control over day-to-day operations than Dr. Jeff in the sense that he acted as the bookkeeper and was responsible for issuing all of the paychecks. It should be noted that Dr. Richard was paid for his bookkeeping work, a practice that contravenes the suggestion that a partnership existed. Generally, a partner is not entitled to payment for services rendered to the partnership. Akerlind v. Buck, 671 N.W.2d 256, 262 (N.D. 2003). It should also be noted that Dr. Jeff had no ownership interest in the equipment which both chiropractors utilized. However, Dr. Jeff worked considerably more in calendar year 2007 than Dr. Richard. Each chiropractor appears to have operated as an independent contractor with respect to the treatment of patients. The record reveals that expenses were shared 50/50 and that Clinic staff worked for and supported both chiropractors.

The fee structure among the chiropractors was such that all fees collected were pooled and deposited in Dr. Richard's account. Expenses were shared on a 50/50 basis and deducted from each chiropractor's monthly paycheck. Each chiropractor received all of the income from the patients he treated, less 50% for their share of expenses. The record clearly reveals, and it is undisputed, that there was no sharing of profits, only expenses. This allocation of revenues is similar to the allocation that existed in Ziegler, where each guide received payment only for the services he actually performed and expenses were shared equally. Ziegler, 691 N.W.2d at 278. This fee structure was found to constitute an independent contractor arrangement rather than profit sharing among partners.

The Court finds that given the lack of profit sharing, the sharing of expenses on a 50/50 basis, and the independent nature of control over the treatment of patients, co-ownership has not been established. It appears there were two separate individuals/chiropractors operating within the Clinic.

This was an office-sharing arrangement with each chiropractor exercising control over his own patients and the income generated from the care and treatment of those patients. The Court finds that the record does not support the existence of a partnership between Dr. Richard Pokorny and Dr. Jeff Pokorny.

B. DR. RICHARD POKORNYAND DR. DAVID POKORNY

The Court further finds that the record does not demonstrate an intent to form a partnership between Dr. Richard Pokorny and Dr. David Pokorny. The agreement signed in 1986 by Dr. Richard and Dr. David expressly states that the chiropractors did not intend to form a partnership. The agreement states that both men intended to operate as independent sole proprietorships. Profits were not shared. Expenses were shared on a 50/50 basis. There is no evidence that partnership tax returns were ever filed. Dr. Richard paid rent to Dr. David for the building in which the Clinic was located and compensated Dr. David for his management of the Clinic. No intent to form a partnership has been established between Dr. Richard and Dr. David. The arrangement between Dr. Richard and Dr. David ended with Dr. David's retirement in 2006.

Co-ownership, which is defined by shared control in management and the sharing of profits and losses, has not been established by the evidence in the record. Gangl, 281 N.W.2d at 580. There is no evidence that Dr. David exercised, or had the power to exercise, any control over the operation of the Clinic after he retired in 2006. Dr. Richard was the manager of the Clinic in 2007. Dr. David received no direct share of any profits generated by any of the chiropractors at the Clinic. Dr. David's only connection to the Clinic in 2007, when Cochell was treated by Dr. Gordon and Dr. Jeff, was that he owned a 48% interest in "all tangible items, equipment, furniture and supplies, as well

as all documents and patient records located therein," and he owned the building in which the Clinic was located. See Docket No. 42-2. Dr. Richard and Dr. Jeff paid rent for the building.

Cochell argues that Dr. David's 48% interest in the Clinic equipment and records is tantamount to a sharing of profits as the "blue sky" value of the Clinic continues to increase and Dr. David will share in the profits if the Clinic were to be sold. Dr. David did not share directly in any profits after he retired in 2006 as profits were never shared, and expenses were shared on a 50/50 basis between Dr. David and Dr. Richard. There is no evidence in the record that Dr. David and Dr. Richard jointly purchased equipment after Dr. David's retirement in 2006. Dr. David does have a 48% interest in the tangible assets of the Clinic. The "blue sky" value is not mentioned in the 1986 agreement or the 2006 document which memorialized the transfer of a 4% interest from Dr. David to Dr. Richard. Cochell's argument is not entirely without merit but would seem to be a slender reed upon which to hang the existence of co-ownership.

Finally, there is no evidence of direct profit sharing between Dr. David and Dr. Richard, nor is there any evidence Dr. David had any control over the operation of the Clinic. The "blue sky" argument cannot overcome the overwhelming evidence which demonstrates a lack of shared control and no direct sharing of profits. As a result, the Court finds that co-ownership has not been established. Given the clear lack of intent and the lack of evidence of co-ownership, the Court concludes that Dr. David Pokorny and Dr. Richard Pokorny are not partners in the Clinic.

IV. CONCLUSION

The Court concludes that the record does not support a finding that a partnership existed between Dr. Richard Pokorny and Dr. David Pokorny or between Dr. Richard Pokorny and Dr. Jeff Pokorny because 1) an intention to become partners does not exist, and 2) co-ownership of the

business is lacking. These are crucial elements needed to establish the existence of a partnership under North Dakota law and such elements are lacking in this case. The record clearly reveals that this was an office sharing arrangement among several chiropractors that grew out of a rather loose business structure. Informal arrangements are not unusual in family businesses. However, "the law requires more than a loose working arrangement before a partnership is established." Gangl, 281 N.W.2d at 581. The record clearly reveals that no partnership involving the Clinic has been established and the Pokorny Chiropractic Clinic is not a legal entity subject to suit.

Accordingly, the Clinic's motion to dismiss (Docket No. 10) is **GRANTED**. The Clinic's motion for oral argument (Docket No. 44) is denied as moot.

IT IS SO ORDERED.

Dated this 4th day of March, 2010.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court